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**IN THE  
COURT OF APPEALS OF INDIANA**

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AARON LEAP,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 41A01-0607-CR-309
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE JOHNSON SUPERIOR COURT  
The Honorable Cynthia Emkes, Judge  
Cause No. 41D02-0405-FA-1

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**APRIL 3, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

## STATEMENT OF THE CASE

Defendant-Appellant Aaron M. Leap appeals the sentence imposed after he pled guilty to three counts of child molesting, Class A felonies. We affirm.

## ISSUES

Leap raises two issues for our review, which we restate as:

- I. Whether the trial court abused its discretion in ordering the sentences to be served consecutively.
- II. Whether the sentence imposed was inappropriate in light of the character of the offender and the nature of the offense.

## FACTS AND PROCEDURAL HISTORY

On three separate occasions in February of 2004, Leap placed his penis in his then six-year-old daughter's anus. On each occasion, Leap took his daughter into her bedroom, undressed her, aroused himself, placed a blanket over his daughter's upper body to drown out her cries, and then penetrated her anus. On one occasion, Leap proceeded even though he heard his daughter's complaints of pain.

After the attacks, Leap's daughter told others about her father's acts. Eventually, Leap was confronted by two members of a local church about his daughter's allegations. Leap thereafter admitted to his pastor and his wife that he had engaged in these acts with his daughter. Soon thereafter, Leap went to the local police station and turned himself in.

Leap was subsequently charged with three counts of child molesting. Leap agreed to a plea agreement which capped each count at the advisory sentence of thirty years and left it to the trial court to determine whether the sentences should be served concurrently

or consecutively. The court ordered Leap to serve thirty years on each count with five years suspended on the first count. The trial court further ordered the sentences to be served consecutively.

## DISCUSSION AND DECISION

### I. WEIGHING/FINDING AGGRAVATORS AND MITIGATORS

Leap contends that the trial court abused its discretion in ordering consecutive sentences. Specifically, Leap contends that the trial court erred in finding certain aggravators and in failing to find certain mitigators.

In general, sentencing decisions are within the trial court's discretion and are governed by Ind. Code § 35-38-1-7.1. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). The trial court's discretion extends to the determination of whether to increase presumptive penalties, impose consecutive sentences on multiple convictions, or both. *Davies v. State*, 730 N.E.2d 726, 741 (Ind. Ct. App. 2000), *trans. denied, cert. denied*, 532 U.S. 945, 121 S.Ct. 1410, 149 L.Ed.2d 352 (2001). When a sentence is enhanced or consecutive sentences are imposed, the trial court must set forth a statement of its reasons for selecting a particular punishment. *Id.* We will examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. *Id.*

Our review of the sentencing transcript discloses that the trial court found the following aggravators: (1) Leap's repeated molestations of his daughter and the psychological pain and emotional scars caused by those acts; (2) the very young age of the victim; (3) Leap's molestation of a victim who was under his care, custody, and

control; (4) Leap's need for rehabilitation; and (5) the need to deter further episodes of molestation. Leap questions the validity of the first two factors, and we discuss each below. In doing so, we note that the trial court essentially treated the first three aggravators as illustrative of the particularized circumstances of the offenses.

A panel of this court has opined that enhancement of a sentence upon the basis of the number of child molesting offenses may be improper. *See Kien v. State*, 782 N.E.2d 398, 411 (Ind. Ct. App. 2003), *trans. denied*. However, the court further held that enhancement is proper when it appears that the trial court considered the ongoing nature of the acts and the effect the acts would have upon the victim. *Id.* The court concluded that where it could be inferred from the evidence that a period of time elapsed in which the defendant would have had "an opportunity to reflect upon his conduct and the harm he was causing [the victim], imposition of an enhanced sentence is proper." *Id.* Because we determined that it was reasonable to infer from the evidence that Kien had an opportunity to reflect upon the harm he was causing, we held that an enhancement based upon "multiple offenses" was proper. *Id.*

Ind. Code § 35-42-4-3(a) states that "[a] person who, with a child under fourteen (14) years of age, performs or submits to intercourse or sexual deviate conduct" commits child molesting. In *Plummer v. State*, 851 N.E.2d 387, 391 (Ind. Ct. App. 2006), we held that a trial court may not use a material element of the offense (such as the age of the victim) as an aggravator unless the child's age is emphasized by the trial court as part of the particular nature and circumstances of the offense.

At Leap's sentencing hearing, the deputy prosecutor argued:

[I]t was very real, very apparent to [Leap] what he was doing to [his daughter]. And yet he, he continued on with that act. And this was a victim who he had the care, custody, control over, and it wasn't like he was just a babysitter, I mean, he was the father of this child. And the violation of that position and trust is a very significant aggravating factor and that we believe you ought to use in, in deciding whether, in deciding whether to give him consecutive sentences, because that's what the State is going to [be] asking for . . . . This is not a crime which happened where, where there was one sexual encounter, where he engaged in two or three different acts, these are separate and distinct times in which he would abuse the child, he would have time to reflect upon his action and what he did, and instead of having remorse at that point and thinking "oh my gosh, what have I done, I need to get help," he goes in then later and then does it again and again. So we have this happening at separate times, which we believe also supports in using that as an aggravating factor to impose consecutive sentences.

(Sentencing Transcript at 26-27).

The trial court addressed the aggravators in the following manner:

[W]hat worse act can you really commit upon your child than to molest them in a manner that, that you have admitted that you have done. And not only on one occasion, not only on two occasions, but on three occasions. This is a young child; I can take into account for aggravation the age of the child. Very young child. The circumstances are particularly heinous because of that. Again, the child was in your care, custody and control, and there's a statutory factor that allows the Court to finding that in aggravation that, that you were entrusted with the care, custody and control over that child. And again, especially because of her age there's greater weight put upon, upon your, your care and custody.

The first time that this offense occurred, I'm more willing to look at this as an anomaly. . . . But Mr. Leap, you know, the second time that it happens, again, the circumstances are just so horrific and outrageous that it not only happens once but for you to step back from the situation, look at the harm that was caused [to] your daughter, obviously, I mean, common

sense would tell you what harms [are] caused physically and emotionally. . . She certainly was harmed more by [these acts] happening a second and third time.

(Sentencing Transcript at 31-32; 35-37).

In imposing the consecutive sentences and finding the aforementioned aggravators, the trial court showed its agreement with the deputy prosecutor's assessment of the case. The trial court emphasized the repeated victimization of Leap's daughter and the result of those repeated acts upon a very young girl. It is this emphasis of the particularized facts and circumstances that supports the court's determination that the commission of multiple offenses and the age of the victim are valid aggravators that impact upon the trial court's determination regarding consecutive sentences.<sup>1</sup>

The trial court found the following mitigators: (1) Leap's cooperation with the police; (2) Leap's limited criminal history; (3) Leap's stable employment history; and (4) Leap's sincere expression of remorse. Leap agrees that these circumstances are mitigators, but he contends that the court should have found other mitigators. Specifically, he contends that the court should have found that (1) he was abused as a child and (2) he would respond favorably to probation or short-term imprisonment. Leap further contends the aggravators and mitigators are in equipoise and that consecutive

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<sup>1</sup> Leap claims that one of the aggravators relied on by the trial court is that the court wanted "to send a message to the community" when it stated that "I wouldn't want someone to walk away thinking I'm not going to receive a harsher sentence if I do it two times or three times." *See* Sentencing Transcript at 37. We note that the trial court finishes its thought by stating, "It should not by any means ever have happened the first time, but you should get no credit for the fact that it happened the second and third time. She certainly was harmed more by [this] happening a second and third time." *Id.* The initial statement, when examined in context, is clearly directed to Leap and it is a particularized statement about his sentence and not a warning to the community in general.

sentences are therefore unwarranted. *See Creekmore v. State*, 853 N.E.2d 523, 529 (Ind. 2005), *clarified on rehearing*, 858 N.E.2d 230.

Although a sentencing court must consider all evidence of mitigating circumstances offered by the defendant, the finding of a mitigating factor rests within the trial court's discretion. *Groves v. State*, 787 N.E.2d 401, 407 (Ind. Ct. App. 2003), *trans. denied*. A court does not err in failing to find mitigation "when a mitigation claim is highly disputable in nature, weight, or significance." *Id.* While a failure to find mitigating circumstances clearly supported by the record "may imply that the sentencing court improperly overlooked them, the court is obligated neither to credit mitigating circumstances in the same way as would the defendant, nor to explain why he or she has chosen not to find mitigating circumstances." *Id.* Indeed, sometimes the weight to be given to an alleged mitigator is no weight at all. *Ross v. State*, 676 N.E.2d 339, 347 (Ind. 1997).

With reference to the first of the additional mitigators, Leap's attorney asked the trial judge "to consider under 5A, his family background." Sentencing Transcript at 24. Section 5A of the pre-sentence report summarizes an interview with Leap about his family background. According to the report, Leap "states he has a good relationship with his family and continues to have contact with them." Appellant's App. at 49. Leap also stated that he was exposed to both physical and sexual abuse and that the latter occurred when he was 6-8 years old.

In its sentencing statement, the trial court made reference to the family relationship but did not address the alleged abuse. Because Leap's statements in the

report are uncorroborated and because abuse was mentioned in passing, but not emphasized, at the sentencing hearing, we conclude that the trial court could not have given the mitigator any weight. Therefore, we do not believe that the court's failure to address the abuse warrants either reversal or remand.

Leap's counsel failed to mention the second additional mitigator at the hearing. If a defendant fails to advance a mitigating circumstance at sentencing, this court will presume that the factor is not significant, and the defendant is generally precluded from advancing it as a mitigator. *Creekmore*, 853 N.E.2d at 530. Thus, because there is no reference to Leap's amenability to probation or short-term imprisonment, we conclude that the mitigator has not been established.

The trial court concluded that the mitigators in the present case were "far outweighed" by the aggravators. *See* Sentencing Transcript at 38. The trial court further concluded that Leap's decision to turn himself in was not significant because he did so after realizing that he would soon be arrested. Although the entry of a guilty plea can be considered a significant mitigator, it is not given much weight where the defendant receives substantial benefits for the plea. As the trial court explained to Leap, his guilty plea saved him from a possible 150-year sentence. Thus, the trial court did not abuse its discretion in not finding the guilty plea to be as significant as Leap alleges. Given the strength of the aggravators and the relative weakness of the mitigators, we cannot conclude that the trial court abused its discretion in determining that the aggravators outweighed the mitigators and that consecutive sentences were warranted.

## II. APPROPRIATENESS OF SENTENCE



Leap contends that the imposition of consecutive sentences is inappropriate. Specifically, he argues that although the offenses he committed were very serious, he is not one of the worst offenders and he did not commit the worst of offenses. Appellant's Brief at 14-15.

A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). We must refrain from merely substituting our opinion for that of the trial court. *Sallee v. State*, 777 N.E.2d 1204, 1216 (Ind.Ct.App.2002), *trans. denied*. In determining the appropriateness of a sentence in light of the "very worst offense and offender" argument, we must concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on the nature, extent, and depravity of the offense for which the defendant was sentenced, and what it reveals about the defendant's character. *See Groves*, 787 N.E.2d at 409 (citing *Watson v. State*, 776 N.E.2d 914, 922 (Ind. Ct. App. 2002); *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*)).

Over a one-week period, Leap subjected his child to a series of unspeakable acts. During that period of time, there is no doubt that he witnessed her confusion and pain. Indeed, he testified that she expressed her pain during one of the instances. Yet, Leap persisted in violating the victim and changed her life forever. For purposes of sentencing, the good that resides in Leap's character is outweighed by the repetition and callousness of his acts. The enhanced sentence imposed by the trial court is appropriate.

## CONCLUSION

The trial court did not abuse its discretion in (1) finding certain aggravators, (2) not finding certain mitigators, or (3) ordering consecutive sentences. The trial court's sentence was appropriate in light of Leap's character and the nature of the offenses.

Affirmed.

BAKER, C.J., and ROBB, J., concur.